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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Promotion of Competitive Networks in Local Telecommunications Markets	)	WT Docket No. 99-217
	)	
Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services	)	
	)	
Cellular Telecommunications Industry Association Petition for Rule Making and Amendment of the Commission's Rules to Preempt State and Local Imposition of Discriminatory And/Or Excessive Taxes	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98

FURTHER REPLY COMMENTS OF THE WIRELESS COMMUNICATIONS ASSOCIATION INTERNATIONAL, INC.

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EXECUTIVE SUMMARY

The Commission has an opportunity in this proceeding to foster rapid deployment of fixed wireless services by extending preemption protection to all subscriber premises fixed wireless antennas up to one meter in diameter or diagonal measurement. As set forth in the prior petition for rulemaking and comments in response to the *Notice of Proposed Rulemaking ("NPRM")* by The Wireless Communications Association International, Inc. ("WCA") and other supporting parties, this public interest objective can and should be achieved by amending the Commission's antenna preemption rule (47 C.F.R. § 1.4000) so that it applies to all fixed wireless antennas covered by the rule, regardless of the services or frequency bands involved. Since the proposed amendment would fully preserve the safety exception already in the rule, the Commission may adopt this proposal without infringing upon the legitimate rights of municipal governments to protect public safety.

Although the NPRM clearly solicited public comments on WCA's proposal to expand the scope of Section 1.4000 of the rules, Concerned Communities and Organizations ("CCO") did not submit initial comments in response to the *NPRM*. Rather, it waited until the reply phase to, for the first time, raise a laundry list of objections which substitute inflammatory rhetoric for substance, in the hope of diverting the Commission's attention from the significant legal and public policy merits of extending preemption protection to all fixed wireless subscribers. Yet even if the Commission were to excuse the procedural impropriety of CCO's tactics, it would have no choice but to reject CCO's filing on the merits, since virtually all of CCO's arguments are based on the false assumption that the proposed amendment to Section 1.4000 would divest local governments of their authority to protect public safety. Moreover, the remainder of CCO's filing is littered with scattershot interpretations of the Telecommunications Act of 1996 (the "1996 Act") and the United States Constitution which have already been rejected by the Commission or which otherwise are plainly wrong.

Stripped to its essence, CCO's submission embodies precisely the sort of ill-considered, anti-consumer attacks on antenna installations that local authorities, property owners and homeowners associations have used repeatedly to prevent subscribers from having full and fair access to fixed wireless services in communities across the United States. Through Section 207 of the 1996 Act, Congress has already directed the Commission to exercise its preexisting statutory authority to preempt such attacks where necessary to ensure that fixed wireless subscribers have such access to video programming services. The record in this proceeding, particularly when viewed in the context of Congress's desire to promote rapid deployment of advanced communications technologies, provides a compelling basis for the Commission to take the next logical step and exercise its preemption authority for the benefit of all subscribers receiving *any* type of fixed wireless service. Nothing in CCO's filing justifies any other result.

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International, Inc. Petition for Rulemaking	)	
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FURTHER REPLY COMMENTS OF THE WIRELESS COMMUNICATIONS ASSOCIATION INTERNATIONAL, INC.

The Wireless Communications Association International, Inc. ("WCA") hereby submits its response to the reply comments submitted by Concerned Communities and Organizations ("CCO") with respect to the Commission's *Notice of Proposed Rulemaking and Notice of Inquiry* in WT Docket No. 99-217 (the "*NPRM*") and *Third Further Notice of Proposed Rulemaking* in CC Docket No. 96-98.[1/]

[1/] As discussed in greater detail herein, CCO opposes the Commission's proposal to adopt WCA's suggested amendment to Section 1.4000 of the Commission's Rules, which would extend preemption protection to all subscriber premises fixed wireless antennas one meter in

In both its initial and reply comments in this proceeding, WCA urged the Commission to adopt WCA's proposal to amend the antenna preemption rule (47 C.F.R. § 1.4000) so that all subscriber premises fixed wireless antennas up to one meter in diameter or diagonal measurement that are used to provide any type of service in any frequency band would be protected against unreasonable local restrictions .[2/] As set forth in the text of the proposed rule amendment provided as Exhibit A to WCA's Petition for Rulemaking submitted on May 26, 1999, this is the *only* change to the rule that WCA has requested at this time.[3/] Adoption of WCA's proposal thus would preserve that portion of the rule that permits municipal authorities to adopt and enforce any type of safety-related antenna restriction, provided that the restriction (1) serves a clearly defined, legitimate safety objective, (2) is nondiscriminatory and (3) is the least burdensome means of achieving the safety

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diameter or diagonal measurement. *See NPRM* at ¶ 69. CCO did not file initial comments in this proceeding, and thus has raised its objections for the first time in its reply comments. As a result, WCA has had no opportunity to respond to CCO's objections during the comment or reply comment cycles established for this proceeding, and thus has submitted a formal request for leave to file these Further Reply Comments to ensure fairness to all parties and that the Commission has a complete record with respect to WCA's proposal.

[2/] Comments of The Wireless Communications Association International, Inc., WT Docket No. 99-217 and CC Docket No. 96-98, at 7-14 (filed Aug. 27, 1999) (the "WCA Comments"); Reply Comments of The Wireless Communications Association International, Inc., WT Docket No. 99-217 and CC Docket No. 96-98, at 3-10 (filed Sept. 27, 1999) (the "WCA Reply Comments").

[3/] *See* Petition of The Wireless Communications Association International, Inc. for Rulemaking Regarding Amendment of Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services, Exhibit A (filed May 26, 1999) (the "WCA Petition"). A copy of the text of WCA's proposed rule amendment is provided as Appendix A hereto.

objective at issue.[4/] Moreover, even in the absence of clearly-defined, legitimate safety objective, municipal authorities would still retain the authority to adopt any type of regulation that does not "impair" the installation, maintenance and use of subscriber premises fixed wireless antennas covered by the rule.[5/] Neither WCA nor the Commission has suggested that Section 1.4000 should be amended to read otherwise, nor has any commenting party to this proceeding advanced any other proposal that would unreasonably infringe upon a local government's ability to protect public safety where installation, maintenance and use of subscriber premises fixed wireless antennas are concerned.[6/]

Notwithstanding the fact that the *NPRM* provided all interested parties with ample notice of WCA's proposal, and that the Commission gave all interested parties a two-week extension of time within which to file initial comments on the *NPRM*,[7/] CCO has raised its objections to WCA's

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[4/] *See* 47 C.F.R. § 1.4000(b).

[5/] *Id.* § 1.4000(a).

[6/] *NPRM* at ¶ 69. *See also* Comments of Sprint Corporation, WT Docket No. 99-217 and CC Docket No. 96-98, at 23-24 (filed Aug. 27, 1999); Comments of AT&T Corp., WT Docket No. 99-217 and CC Docket No. 96-98, at 36-44 (filed Aug. 27, 1999) (the "AT&T Comments"); Comments of Teligent, Inc., WT Docket No. 99-217 and CC Docket No. 96-98, at 43-48 (filed Aug. 27, 1999) (the "Teligent Comments"); Comments of the Personal Communications Industry Association, CC Docket No. 99-217 and CC Docket No. 96-98, at 33-35 (filed Aug. 27, 1999) (the "PCIA Comments"); Comments of WinStar Communications, Inc., WT Docket No. 99-217 and CC Docket No. 96-98, at 73-75 (filed Aug. 27, 1999) (the "WinStar Comments"); Comments of the Fixed Wireless Communications Coalition, WT Docket No. 99-217 and CC Docket No. 96-98, at 14-15 (filed Aug. 27, 1999) (the "FWCC Comments").

[7/] *See Promotion of Competitive Networks in Local Telecommunications Networks, et al.*, WT Docket No. 99-217 and CC Docket No. 96-96, DA No. 99-1563 (rel. Aug. 6, 1999) (extending *NPRM* comment deadline from August 13 to August 27, 1999).

proposal for the first time in reply comments which WCA has had no opportunity to address in this proceeding.[8/] Yet even if the Commission were to excuse the procedural impropriety of CCO's filing, it would have no choice but to reject CCO's filing on the merits, since virtually all of CCO's arguments are based on the false assumption that the proposed amendment to Section 1.4000 would divest local governments of their authority to protect public safety.[9/] Indeed, CCO confirms its complete misunderstanding of WCA's proposal by asserting, among other things, that the proposed amendment would allow "an unlimited number of antennas for fixed wireless services on the roofs of multi-tenant buildings" and " permanent physical occupation of [government] properties," neither of which WCA nor the Commission has ever advocated in this proceeding.[10/] CCO also relies on a variety of statutory and constitutional arguments that have already been rejected by the Commission or that otherwise are plainly wrong.[11/]

At bottom, CCO's filing embodies precisely the sort of ill-considered, anti-consumer attacks on antenna installations that non-federal authorities, property owners and homeowners associations have repeatedly used to prevent subscribers from receiving fixed wireless services in communities across the United States.[12/] Given Congress's clear mandate that the Commission "accelerate rapidly

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[8/] *See* Reply Comments of Concerned Communities and Organizations, WT Docket No. 99-217 and CC Docket No. 96-98 (filed Sept. 27, 1999) (the "CCO Reply Comments").

[9/] *See, e.g., id.* at 3-14.

[10/] *Id.* at (i), 29.

[11/] *Id.* at 32-42.

[12/] *See, e.g., Implementation of Section 207 of the Telecommunications Act of 1996; Restrictions on Over-the-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint*

private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition,"[13/] the Commission must not permit CCO to defeat that agenda via scare tactics and mischaracterizations of WCA's proposal. WCA thus asks that the Commission remain on the pro-competitive and pro-consumer course charted by Congress and adopt WCA's proposed amendment to Section 1.4000 as suggested in the *NPRM*.

Distribution Service, 11 FCC Rcd 19276, 19286 (1996) ("The record is replete with examples of various requirements imposed on those who wish to install DBS dishes or MMDS antennas on their property.") (the "*Section 207 Report and Order*"); *Stanley and Vera Holliday*, DA 99-2132 (CSB, rel. Oct. 8, 1999) (preempting HOA prior approval requirement for all outdoor antennas); *Jay Lubliner and Deborah Galvin*, 13 FCC Rcd 16107 (1998) (preempting HOA covenant precluding the use of any type of outdoor antenna); *James Sadler*, 13 FCC Rcd 12559 (CSB, 1998) (preempting HOA restriction prohibiting installation of any outdoor antenna not installed by the HOA); *Jordan E. Lourie*, 13 FCC Rcd 16760 (CSB, 1998) (preempting HOA restriction stating that "[n]o exterior television or radio antenna of any sort" may be installed on any structure within the antenna user's property); *Wireless Broadcasting Systems of Sacramento, Inc.*, 12 FCC Rcd 19746 (CSB, 1997) (preempting HOA restriction prohibiting installation of any antennas or satellite dishes on a user's property); *Victor Frankfurt*, 12 FCC Rcd 17631 (CSB, 1997) (preempting HOA restriction stating that "no antennas of any kind may be attached to any part of the building exterior"); *Michael J. MacDonald*, 13 FCC Rcd 4844 (CSB, 1997) (preempting HOA restriction on all antennas one meter or less in diameter); *CS Wireless Systems, Inc. d/b/a OmniVision of San Antonio*, 13 FCC Rcd 4826 (CSB, 1997) (preempting HOA covenant stating that "[n]o antenna or device of any type for receiving or transmitting signals (electronic or otherwise) shall be erected, constructed, placed or permitted to remain on the exterior of any houses, garage or buildings constructed on any lot; nor shall any free standing antenna of any style be permitted to remain on any Lot").

[13/] 1996 Act, § 706(a).

II. DISCUSSION.

A. CCO's ARGUMENTS ARE BASED ON A FUNDAMENTAL MISUNDERSTANDING OF WCA's PROPOSAL.

1. The Proposed Amendment to Section 1.4000 Would Not Divest State and Local Authorities of Their Authority to Protect Public Safety.

Most every argument proffered by CCO assumes that adoption of WCA's proposal would abrogate the right of local authorities to protect public safety.[14/] Indeed, contrary to its assertion that local governments "should not engage in speculation,"[15/] CCO claims with no factual or legal support whatsoever that adoption of WCA's proposal would "cause catastrophic building collapse, injure firemen, and cause loss of life and extensive damage to property."[16/] It appears, in fact, that CCO's imagination truly knows no boundary: at one point in its pleading, CCO goes so far as to argue that adoption of WCA's proposal would endanger public health by exposing consumers to unsafe levels of asbestos and lead-based paints.[17/]

WCA cannot put it more explicitly than this: *the proposed amendment to Section 1.4000 would preserve the authority of local governments to protect public safety in accordance with the*

[14/] *See, e.g.,* CCO Reply at (i) ("To protect the public health and safety, [municipal safety] codes require meaningful enforcement . . . . Any rule must expressly allow such codes to be enforced."); at (ii) ("[A]ny preemption by the Commission of safety-related codes . . . would be unconstitutional."); at 2-3 ("[WCA's proposal] could have severe negative impacts on the public health, safety and welfare by affecting safety and health related codes . . . ."); and at 9 ("The Commission should thus not act to preempt safety and related codes.").

[15/] *Id.* at 8.

[16/] *Id.* at (i).

[17/] *Id.* at 6-7.

existing parameters of the rule. More specifically, safety-based antenna restrictions will continue to be immune from preemption if they serve clearly-defined, legitimate safety objective, and are nondiscriminatory and no more burdensome than necessary.[18/] By now this point should be no mystery, as it was made no fewer than three separate times in WCA's filings prior to submission of CCO's reply comments.[19/] CCO's repeated assertions to the contrary thus are wrong, and, given the state of the record, border on a deliberate distortion of WCA's proposal.

Also wrong is CCO's claim that adoption of the proposed amendment would be tantamount to an automatic preemption of municipal safety-related codes, including municipal fire and electrical codes.[20/] The Commission put this matter to rest in its 1996 *Report and Order* adopting Section 1.4000:

> [R]egulations that serve a stated safety purpose, such as restrictions requiring minimum distances from high voltage power lines, are permitted. Similarly, a restriction that precludes any installations very near streets and intersections in order to preserve a clear line of sight for drivers is safety-related and permitted, provided that all comparable installations, e.g., foliage, are also precluded. Safety regulations stipulating the adequate bolting or guying of antennas are enforceable under the rule we are adopting, as are the provisions of the model fire code, prohibiting "furnishings, decorations, or other objects . . . [that] obstruct fire exits, access thereto, egress therefrom, or visibility thereof." Although the receive-only devices at issue

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[18/] 47 C.F.R. § 1.4000(b)(1). Under the Commission's current interpretation of the rule, municipal governments do not even have to demonstrate that a safety-related objective is "compelling." *Implementation of Section 207 of the Telecommunications Act of 1996; Restrictions on Over-the-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service*, 13 FCC Rcd 18692, 18969 (1998) (the "*Section 207 Reconsideration Order*"). So long as the objective is clearly defined, legitimate, and set forth in a document that is readily available to subscribers, it will pass muster under the rule.

[19/] *See* WCA Petition at 7-8 and at Exhibit A; WCA Comments at 8-9.

[20/] *See, e.g.,* CCO Reply Comments at 4-7.

> here do not pose significant local health concerns, to the extent that these antennas have transmit capabilities, they must comply with our RF emissions standards as well as with any applicable local health regulations.[21/]

In other words, the proposal is clear--municipal safety-related codes will not be preempted under the amended rule any more than they are preempted under the existing rule. Hence, contrary to CCO's contention that Section 1.4000 provides no guidance as to what types of municipal safety-related codes are permissible,[22/] the rule in fact already permits state and local governments to enforce the very same municipal safety-related codes that CCO alleges would be preempted by WCA's proposed amendment. So long as the restriction truly serves a clearly-defined, legitimate safety objective and is nondiscriminatory and no more burdensome then necessary, it can be enforced. In turn, since WCA's proposal has no impact whatsoever on the safety-related portions of the rule, CCO's argument that the proposal would automatically preempt municipal safety-related

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[21/] *Implementation of Section 207 of the Telecommunications Act of 1996; Restrictions on Over-the-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service*, 11 FCC Rcd 19276, 19286-7 (1996) (footnotes omitted) (the "*Section 207 Report and Order*"). *See also Federal Communications Commission Fact Sheet, "Over-the-Air Reception Devices Rule,"* at 3 (June, 1999) ("[M]any restrictions are permitted. . . Examples of valid safety restrictions include fire codes preventing people from installing antennas on fire escapes; restrictions requiring that a person not place an antenna within a certain distance from a power line; electrical code requirements to properly ground the antenna; and installation requirements that describe the proper method to secure an antenna.") (the "*June 1999 Fact Sheet*"). Moreover, if CCO is genuinely concerned about consumer exposure to lead-based paints, then it would do well to consult the *June 1999 Fact Sheet*, in which the Commission states that painting requirements are likely to be permissible so long as they do not interfere with reception or impose unreasonable costs on the antenna user. *June 1999 Fact Sheet* at 2; *see also Otto and Ida M. Trabue*, DA 99-942, at ¶ 18 (CSB, rel. May 19, 1999) ("A requirement to paint a satellite dish is not *per se* prohibited by the Rule and is . . . likely to be acceptable under the Rule.").

[22/] CCO Reply Comments at 8.

codes is entirely without merit and should be rejected.[23/]

CCO also overlooks the fact that even in the absence of clearly defined, legitimate safety objective, local governments will retain the authority to impose *any* type of restriction that does not "impair" installation, maintenance and use of any subscriber premises fixed wireless antenna that is up to one meter in diameter or diagonal measurement.[24/] "Impairment" exists where an antenna restriction (1) unreasonably delays or prevents installation, maintenance or use; (2) unreasonably increases the cost of installation, maintenance or use; or (3) precludes reception of an acceptable quality signal.[25/] As with other provisions of Section 1.4000, the Commission specifically chose an "impairment" standard to preserve, not eliminate, the right of municipal authorities to protect public health, safety and welfare:

> By limiting the prohibition of local restrictions to those that "impair" - - the statutory term - - rather than applying the prohibition to all restrictions that "affect," it is more

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[23/] CCO claims that "the wireless industry has not taken the basic step of attempting to work with the national code organizations or other entities on matters of concern to them . . . ." *Id.* at 8. It is a matter of public record that this statement is absolutely false. WCA has repeatedly attempted to work with BOCA to develop reasonable installation standards for fixed wireless antennas, but has been rebuffed at every turn. *See, e.g., Section 207 Reconsideration Order*, 13 FCC Rcd at 18979 n.101 (discussing BOCA's rejection of WCA's proposed standard installation method for fixed wireless antennas).

[24/] As to larger "C-Band" satellite dishes, Section 25.104(a) of the Commission's Rules generally permits state and local authorities to impose antenna restrictions that further a " clearly defined health, safety or aesthetic objective without unnecessarily burdening the federal interests in "ensuring access to satellite services and effective competition among competing communications service providers." *See* 47 C.F.R. § 25.104(a).

[25/] 47 C.F.R. § 1.4000(a)(2). In situations where a local ordinance does not satisfy the "impairment" standard, the rule specifically permits the Commission to waive preemption where a municipal government demonstrates that local concerns of a highly specialized nature are at issue. *Id.* § 1.4000(c).

> faithful to Section 207 and intrudes less into local governance. By more clearly defining and providing examples of which local restrictions are prohibited and which are not, we make our rule simpler, and less burdensome. By abandoning the presumption . . . that all restrictions affecting reception are unreasonable, and therefore unenforceable until waived by Commission action, we spare localities and antenna users unnecessary administrative burden and expense. Under our revised rule, localities and associations need not come to the Commission to enforce restrictions that may affect but do not impair reception, or that may impair reception but are narrowly tailored to serve public safety or historic preservation objectives.[26/]

In sum, by preserving the safety exception to Section 1.4000 in its entirety, WCA's proposal maintains the careful balance between federal and local concerns that lies at the heart of the rule and, for that matter, the Telecommunications Act of 1996 (the "1996 Act"). WCA's proposal in no respect invades the legitimate rights of local authorities to protect public health, safety and welfare, nor can it be sensibly read as such.

2. *The Proposed Amendment to Section 1.4000 Would Not Permit Fixed Wireless Providers or Subscribers To Install Antennas on Rooftops Without a Property Owner's Permission, and Does Not Implicate the Inside Wiring Issues Raised by CCO.*

CCO alleges that "[t]he proposed rule would allow an unlimited number of antennas for fixed wireless service on the roofs of multi-tenant buildings and would allow multiple wires to be strung from the roof antennas . . . to individual tenants, all over the landlord's objection."[27/] CCO also appears to suggest that WCA's proposal would empower utilities to condemn "whatever space is

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[26/] *Section 207 Report and Order*, 11 FCC Rcd at 19282.

[27/] CCO Reply Comments at (i). *See also id.* at 6 ("The Commission's proposed rule contemplates extensive construction in multi-tenant buildings as it would require new wires to be run to each new tenant who desires service from the new wireless (or conventional wired) telephone providers.") and at 9 ("[T]he *NPRM* contemplates an unlimited number of antennas being placed on the roof[s] of buildings.").

necessary within a building so that many new wires [may] reach all occupants."[28/] Once again, CCO wrongly mischaracterizes the proposal advanced by WCA and the Commission.

In its *Second Report and Order* in CS Docket No. 96-83, the Commission stated in no uncertain terms that Section 1.4000 does not give a fixed wireless provider or subscriber a right to install an antenna on a rooftop or other common property without a property owner's permission.[29/] Neither WCA nor the Commission have proposed to amend that portion of the rule. Accordingly, CCO is flat out wrong when it asserts that the proposed amendment to Section 1.4000 would permit "an unlimited number of antennas" to be installed on common area rooftops without a property owner's consent. For the same reason, the proposed amendment would not permit "multiple wires" to be run from a rooftop through common areas to the units of individual tenants over a property owner's objection, as CCO claims.[30/]

Further, to the extent CCO believes that WCA's proposal would give utilities additional condemnation rights within MTE property, it has confused WCA's proposal with the Commission's separate proposal to interpret the term "right-of-way" in Section 224(f)(1) of the Communications

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[28/] *Id.* at 11.

[29/] *Implementation of Section 207 of the Telecommunications Act of 1996; Restrictions on Over-the-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service (Second Report and Order)*, 13 FCC Rcd 23874, 23893 (1998).

[30/] CCO appears to have incorrectly assumed that WCA's proposal applies exclusively to MTE environments. In fact, as already set forth in WCA's initial comments in this proceeding, the proposed amendment would also benefit the substantial number of existing and potential subscribers who wish to receive fixed wireless services in single family residences. *See* WCA Comments at 8-9.

Act of 1934 (the "1934 Act"), as amended, to encompass private as well as public rights-of-way.[31] Though WCA agrees with the Commission's proposed interpretation of the statute,[32] the proposed amendment to Section 1.4000 has no bearing on that issue. This is because Section 1.4000 (both before and after the amendment proposed by WCA) only protects those antennas in the MTE environment that are installed within an individual tenant's leasehold, not those installed on common area rooftops. Accordingly, WCA's proposal does not implicate a utility's condemnation obligations where a competing provider seeks to run wiring from a rooftop through private rights of way in common areas, and thus WCA's proposal may be granted irrespective of how the Commission rules on that point.

3. The Proposed Amendment to Section 1.4000 Has No Bearing On Rights of Access to Government Property.

CCO contends that Section 1.4000, if amended as proposed by WCA, should not apply to government property.[33] Citing Section 704(c) of the 1996 Act, CCO notes that the General Services Administration has already developed procedures for placing commercial antennas on government property, and that the Commission cannot enforce Section 1.4000 in a manner that would render those procedures ineffective.[34]

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[31] *See NPRM* at ¶¶ 39-42.

[32] *See* WCA Comments at 16-22.

[33] CCO Reply Comments at 25-32.

[34] *Id.* at 14-15, 26-28. Section 704(c) directs the President or his designee to "prescribe procedures by which Federal departments and agencies may make available on a fair, reasonable, and non-discriminatory basis, property, rights-of-way and easements under their control for the placement of new telecommunications services that are dependent, in whole or in part, upon the

The intended beneficiaries of WCA's proposal are subscribers who reside in *private* residential or commercial properties. Nothing in WCA's proposal relates to use of government property, and at no time has WCA or, to WCA's knowledge, the Commission ever suggested that Section 1.4000 should preempt any special access procedures adopted for government property in accordance with Section 704(a) or any other relevant law. Here again, CCO's argument is empty speculation and should be rejected.

B. THE COMMISSION'S EXERCISE OF ITS STATUTORY AUTHORITY TO GRANT WCA'S PROPOSAL WOULD NOT CONFLICT WITH ANY PROVISION OF THE 1996 ACT.

As already set forth in great detail in WCA's prior filings in this proceeding, the Commission has authority under the 1934 Act to amend Section 1.4000 as proposed by WCA.[35/] Contrary to what CCO suggests in its reply comments, Section 207 of the 1996 Act does not preclude the Commission from extending the benefits of the rule to subscriber premises antennas used to deploy any service in any frequency band.[36/] Rather, Section 207 merely directed the Commission to exercise the preemptive authority it already had "pursuant to Section 303 of the Communications Act" to prohibit restrictions on over-the-air reception of video programming delivered via certain specified services.[37/] WCA has previously demonstrated that Section 207 does not in any respect confine the Commission's broad power to preempt restrictions on subscriber premises antennas of any type

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utilization of Federal spectrum rights for the transmission or reception of such services."

[35/] *See, e.g.*, WCA Comments at 7-14; WCA Petition at 8-13.

[36/] *See* CCO Reply Comments at 24-25.

[37/] 1996 Act, § 207.

where necessary to achieve the objectives of the 1934 or 1996 Acts, and that showing need not be repeated here.[38/]

Nonetheless, CCO argues that the Commission's authority to amend Section 1.4000 as requested by WCA is obviated by Sections 332(c)(7) and 253 of the 1934 Act and Section 601(c)(1) of the 1996 Act. For the reasons set forth below, CCO is incorrect on all counts.

1. Section 332(c)(7).

Section 332(c)(7)(A) provides that, subject to certain exceptions, "nothing in this Act shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities."[39/] The most important of the exceptions is contained within Section 332(c)(7)(B)(I)(ii), which states that a State or local government shall not take any action under Section 332(c)(7)(A) that"prohibit[s] or [has] the effect of prohibiting the provision of personal wireless services."[40/] For the reasons set forth below, the term "personal wireless service facilities" was intended to refer to cell site towers and other infrastructure-related equipment, not the subscriber premises antennas at issue here.

Section 332(c)(7)(A) does not specify what types of equipment or physical plant are encompassed by the term "personal wireless service facilities," instead, the statute defines the term

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[38/] *See,* WCA Comments at 7-14. *See also Preemption of Local Zoning and Other Regulation of Receive-Only Satellite Earth Stations*, 51 Fed. Reg. 5519 (1986) (preempting non-federal restrictions on use of C-band antennas); *Earth Satellite Communications, Inc.*, 95 F.C.C. 2d 1223 (1983), *aff'd sub nom. N.Y. State Com'n On Cable Television v. FCC*, 749 F.2d 804 (D.C. Cir. 1984) (preempting state regulation of SMATV service).

[39/] 47 U.S.C. § 332(c)(7)(A).

[40/] *Id.* § 332(c)(7)(B)(i)(II).

simply as those facilities used to provide "personal wireless services." From this ambiguity CCO infers that the term "personal wireless service facilities" must encompass *all* facilities used to provide "personal wireless services," including subscriber premises antennas.[41/] The Commission, however, must arrive at an interpretation of "personal wireless service facilities" that is consistent with the "language and design of the statute as a whole."[42/] There is nothing in the text or legislative history of Section 332(c)(7) which indicates that Congress intended to extend the term "personal wireless service facilities" to encompass subscriber premises antennas. Indeed, all available evidence confirms that Congress was primarily concerned with preserving the rights of local authorities to regulate placement, construction and modification of cell site towers, an issue unrelated to WCA's proposal.[43/]

[41/] In support, CCO cites the Conference Report to the 1996 Act, in which Congress stated, *inter alia*, that the facilities encompassed by Section 332(c)(7) "include other Commission licensed wireless common carriers such as point to point microwave in the extremely high frequency portion of a electromagnetic spectrum . . . ." CCO Reply Comments at 21, *quoting* H.R. Rep. No. 104-458, 104th Cong., 2d Sess. at 209 (1996) (the "Conference Report"). Section 332(c)(7) itself, however, only preserves the right of local authorities to regulate "personal wireless service facilities." The quotation relied upon by CCO therefore is irrelevant, since it only refers to the types of carriers that are covered by the statute. It does not identify which of those carriers' facilities are subject to local regulation as "personal wireless service facilities."

[42/] *See, e.g, King v. St. Vincent's Hospital,* 502 U.S. 570, 574 (1991) (when interpreting statutory language, the "cardinal rule is that a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context."); *ASTV v. FCC*, 46 F.3d 1173, 1178 (D.C. Cir. 1995), *quoting Fort Stewart Schools v. FLRA*, 495 U.S. 641, 645 (1990) ("If, upon examination of 'the particular statutory language at issue as well as the language and design of the statute as a whole,' it is clear that the Authority's interpretation is incorrect, then we need look no further.").

[43/] *See* Conference Report at 207 (1996) ("Section 108 of the House amendment required the Commission to issue regulations within 180 days of enactment for siting of CMS. A negotiated rulemaking committee . . . [was] to have attempted to develop a uniform policy to propose to the

Further, where Congress chose to address federal preemption of local restrictions on "over-the-air reception devices," it did so explicitly through Section 207, not Section 332(c)(7). This suggests that when Congress omitted the term "over-the-air reception devices" from Section 332(c)(7), it did so intentionally.[44] Had Congress intended that Section 332(c)(7) apply to "over-the-air reception devices," it presumably would have done so expressly as it did in Section 207.[45]

Finally, it is very difficult to square CCO's reading of Section 332(c)(7) with Congress's overriding desire to "promote competition and . . . encourage the rapid deployment of new

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Commission for the siting of *wireless tower sites*." (emphasis added); *id.* at 208 ("The intent of the conferrees is to ensure that a State of local government does not in making a decision regarding the placement, construction and modification of facilities of personal wireless services . . . unreasonably favor one competitor over another. . . For example, the conferees do not intend that if a State of local government grants a permit in a commercial district, it must also grant a permit for a competitor's 50-foot tower in a residential district."). CCO wrongly asserts that these quotations, which first appeared at page 9, footnote 14 of the WCA Comments, are from the House Report and thus carry less weight than CCO's own quotations from the Conference Report. CCO Reply Comments at 21. Obviously, since the quotes in fact are from the Conference Report, CCO is in error.

[44] *See, e.g., Russello v. United States*, 464 U.S. 16, 23 (1983), *quoting United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

[45] Other provisions of the Act preserve the distinction between equipment located within a subscriber's premises and the infrastructure facilities clearly covered by Section 332(c)(7). For instance, the Act specifically defines "customer premises equipment" as "equipment employed on the premises of a person (other than a carrier) to originate, route, or terminate telecommunications." 47 U.S.C. § 153(14). Yet Congress chose not to apply Section 332(c)(7) to "customer premises equipment"; instead, it chose the far more ambiguous "personal wireless service facilities." Again, it must be assumed that Congress's omission of the term "customer premises equipment" from Section 332(c)(7) was not unintentional, and that Congress therefore did not intend that the statute encompass *all* equipment used to deploy "personal wireless facilities."

telecommunications technologies."[46] To achieve that objective, the 1996 Act is designed to "stop local authorities from keeping wireless providers tied up in the hearing process."[47] Under CCO's interpretation of the statute, however, fixed wireless providers and potentially thousands of fixed wireless subscribers could be required to endure formal hearings (and the substantial costs and time delays associated therewith) as a precondition of receiving local approval of antennas installed on their premises.[48] Where subscriber premises fixed wireless antennas are used to provide video programming services, the Commission has already observed that prior approval requirements "can impede a service provider's ability to compete, since customers will ordinarily select a service less subject to uncertainty and procedural requirements."[49] That observation is equally true where those same antennas are used to receive non-video services in any frequency band, and thus militates against any interpretation of Section 332(c)(7) that ensnares fixed wireless subscribers in the web of municipal prior approval procedures that more sensibly apply to cell site towers.

In any case, even if the Commission were to somehow determine that Section 332(c)(7)(A)'s reference to "personal wireless service facilities" applies to subscriber premises fixed wireless antennas up to one meter in diameter or diagonal measurement, the fact remains that local regulation

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[46] Pub. L. No. 104-104, 100 Stat. 56, preamble (1996).

[47] *Sprint Spectrum L.P. v. Town of Easton*, 982 F.Supp. 47, 49 (D. Mass. 1997).

[48] Section 332(c)(7)(B)(iii) states that "[a]ny decision by a State or local government or instrumentality thereof to deny a request to place, construct or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record." 47 U.S.C. § 332(c)(7)(B)(iii).

[49] *Section 207 Report and Order*, 11 FCC Rcd at 19287.

of "personal wireless facilities" cannot "prohibit or have the effect of prohibiting the provision of personal wireless services."[50/] Similarly, local restrictions on subscriber premises antennas already covered by Section 207 of the 1996 Act and Section 1.4000 of the Commission's Rules cannot "impair" installation, maintenance or use of such facilities.[51/] The legislative history of Section 207 reflects that Congress intended the term "impair" to mean "prevent."[52/] Since in this context "prevent" and "prohibit" mean the same thing, an extension of Section 1.4000 to encompass local regulation of all fixed wireless antennas up to one meter in diameter or diagonal measurement would not divest local authorities of any rights they already have under Section 332(c)(7).[53/]

2. Section 253.

At paragraph 69 of the *NPRM*, the Commission requests comment on whether it has authority under Section 253(d) of the 1934 Act to preempt non-federal restrictions on subscriber premises

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[50/] 47 U.S.C. § 332(c)(7)(B)(i)(II).

[51/] 1996 Act, § 207; 47 C.F.R. § 1.4000(a)(1).

[52/] *See* H.R. Rep. 104-204, 104th Cong., 1st Sess. at 123-4 (1995) ("The Committee intends this section to preempt enforcement of State or local statutes and regulations, or State or local legal requirements, . . . that *prevent* the use of antennae designed for off-the-air reception of television broadcast signals or of satellite receivers designed for receipt of DBS services.") (emphasis added).

[53/] Ironically, Section 1.4000 actually imposes *fewer* procedural burdens on municipal governments than Section 332(c)(7). For example, as noted above, Section 332(c)(7)(B)(ii) requires that any municipal denial of a request to place, construct or modify personal wireless service facilities be in writing and supported by substantial evidence contained in a written record. There is no such requirement in Section 1.4000. Instead, the rule permits a municipality to immediately ask the Commission for a declaratory ruling on the legality of the restriction at issue, without having to develop a record and issue a written denial of an antenna user's request for approval on the basis of "substantial evidence." *See* 47 C.F.R. § 1.4000(d).

fixed wireless services as set forth in WCA's proposal. Section 253(d) states that the Commission, after providing notice and opportunity for public comment, *shall* preempt any State or local statute, regulation of legal requirement that violates Sections 253(a) or (b).[54/] Section 253(a) provides that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[55/] The Commission's right to preempt under Section 253(a) is subject to Section 253(b), which preserves the ability of a State to impose, on a competitively neutral basis, requirements necessary to, *inter alia*, "protect the public safety and welfare."[56/]

When read together with Sections 253(a) and (b), Section 253(d) *mandates* that the Commission preempt restrictions that "impair" installation, maintenance or use of subscriber premises fixed wireless antennas used to deploy telecommunications services. As discussed above, any local law that "impairs" installation, maintenance or use of fixed wireless antennas "prohibit[s] or has the effect of prohibiting" the provision of telecommunications services. Moreover, the exception in Section 253(b) for public safety (which does not even apply to municipal regulations) is preserved via the safety exception in Section 1.4000. Accordingly, Section 253(d) buttresses the agency's authority to grant WCA's proposal.[57/]

[54/] 47 U.S.C. § 253(d).

[55/] 47 U.S.C. § 253(a).

[56/] *Id.* § 253(b).

[57/] CCO's arguments to the contrary are based on the mistaken assumption that a grant of WCA's proposal would automatically preempt local antenna restrictions without any subsequent case-by-case review thereof. *See* CCO Reply Comments at 23 ("[T]here has been no description at all

3. Section 601(c)(1).

Citing the fact that Section 207 makes no reference to telecommunications services, CCO argues that the Commission's authority to amend Section 1.4000 as proposed by WCA is obviated by Section 601(c)(1) of the 1996 Act, which states that the 1996 Act "shall not be construed to modify, impair, or supersede Federal, State or local law unless expressly so provided in such Act or amendments."[58/] Here CCO completely misperceives the legal basis for the Commission's authority to grant WCA's proposal. As noted above and in WCA's prior filings in this docket, Section 303 of the 1934 Act, not Section 207 itself, is the root of the Commission's preemption authority in this matter. The Commission thus may grant WCA's proposal without any further directive from Congress, since the 1996 Act did not abrogate or limit the agency's broad Section 303 authority to preempt non-federal antenna restrictions where necessary to protect the public interest.

C. THE PROPOSED AMENDMENT TO SECTION 1.4000 IS NOT UNCONSTITUTIONAL.

Citing the Supremacy Clause, the Necessary and Proper Clause and the Tenth Amendment, CCO alleges that the proposed amendment to Section 1.4000 represents an unconstitutional constraint upon local regulatory authority.[59/] As demonstrated in WCA's prior filings, a long line of

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in the comments to this proceeding of any *impact* of zoning or land use laws on the provision of telecommunications services . . . . Thus, the threshold requirement of Section 253(a) has not been met."; *id.* at 24 (Section 253(d) "does not allow preemption by rulemaking."). Case-by-case review is in fact required under Section 253(d) and Section 1.4000, and WCA's proposal would preserve that requirement.

[58/] CCO Reply Comments at 24, *quoting* 1996 Act, § 601(c)(1).

[59/] *Id.* at 33-34, 35-42.

Supreme Court precedent reflects otherwise.[60]

It is well settled that the Commission may preempt any state or local regulation that "stands as an obstacle to the accomplishment and execution of the full objectives of Congress."[61] The Commission's authority to so preempt arises first and foremost from Section 1 of the Communications Act, which directs the Commission to "make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide and world-wide wire and radio communications service . . . ."[62] The Supreme Court has confirmed that Congress meant to confer "broad authority" on the Commission, so as "to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission."[63] Thus, Section 4(I) of the Act states that the Commission "may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."[64] Similarly,

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[60] *See* WCA Comments at 10-11.

[61] *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699 (1984) ("*Crisp*"), *quoting Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *see also City of New York v. FCC*, 486 U.S. 57, 64 (1988); *Rulemaking to Amend Parts 1, 2, 21 and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services (Second Report and Order, Order on Reconsideration and Fifth Notice of Proposed Rulemaking)*, 12 FCC Rcd 12545, 12769-12700 (1997), *citing Fidelity Fed. S&L Ass'n v. De La Cuesta*, 458 U.S. 141, 156 (1982).

[62] 47 U.S.C. § 151.

[63] *FCC v. Midwest Video Corp.*, 440 U.S. 689, 696 (1979), *quoting FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940) (citations omitted); *see also National Broadcasting Co. v. United States*, 319 U.S. 190, 219 (1943) (Congress granted the Commission "expansive powers" through the Communications Act).

[64] 47 U.S.C. § 154(i).

Section 303 gives the Commission the power to issue rules and regulations "as public convenience, interest and necessity requires."[65] The need for such comprehensive power stems from "the practical difficulties inhering state-by-state regulation of parts of an organic whole . . . fifty states and myriad local authorities cannot effectively deal with bits and pieces of what is really a unified system of communications."[66]

Accordingly, the Commission has repeatedly exercised its broad authority to preempt non-federal rules and regulations that directly or indirectly impaired the installation or use of antennas necessary for consumers to access wireless services. For instance, in 1983 the Commission preempted state regulation of satellite master antenna television service. In so doing, the Commission noted that:

> [a]lthough preemption was not specifically discussed in our satellite authorization proceedings or in our deregulation of earth stations, we believe it is clear that local prior approval requirements are inconsistent with national policies in these areas. In more general terms, *"receiving sets" have been held to be "absolutely essential instrumentalities" of radio broadcasting.*[67]

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[65] *Id.* § 303.

[66] *General Telephone of California v. FCC*, 413 F.2d 390, 398, 401 (D.C. Cir. 1968).

[67] *Earth Satellite Communications, Inc.*, 95 FCC 2d 1223, 1232 (1983) (citation omitted) (emphasis added), *aff'd sub nom. N.Y. State Com'n On Cable Television v. FCC*, 749 F.2d 804 (D.C. Cir. 1984). Similarly, in affirming the Commission's decision in *Orth-O-Vision, Inc.* to preempt state regulation of MDS service, the United States Court of Appeals for the Second Circuit observed that such regulation "could frustrate the development of an interstate network by increasing the cost for each program per receiver." *N.Y. State Com'n On Cable T.V. v. FCC*, 669 F.2d 58, 65-66 (2nd Cir. 1982) (footnote omitted).

Similarly, in 1986 the Commission preempted state and local restrictions on satellite receive antennas that are very similar to the restrictions at issue here.[68/] Explicitly rejecting the Tenth Amendment proffered by CCO, the Commission took such action to give effect to the Congressional policy favoring development of new technologies and expanded consumer choice, as expressed at that time in Section 705 of the Communications Act (47 U.S.C. § 605).[69/] The Commission concluded that

> [i]f individuals cannot use antennas to receive satellite delivered signals because of discrimination or excessive state and local regulation, their right of access as established by section 705 [of the Communications Act] to interstate communications delivered by satellite will be useless. . . . Such regulations would frustrate our competitive regulatory policies which have been promulgated to provide for a variety of service[s] by consumers. It would be contrary to those policies to permit discriminatory local regulation which reduces the range of choice.[70/]

Simply stated, there is no constitutional barrier to favorable Commission action on WCA's proposal. CCO's arguments to the contrary are without merit.

[68/] *Preemption of Local Zoning and Other Regulation of Receive-Only Satellite Earth Stations*, 51 Fed. Reg. 5519 (1986) (the "*1986 Satellite Preemption Order*").

[69/] *See Local Zoning Regulations (Notice of Proposed Rulemaking)*, 100 FCC 2d 846, 850 (1985) ("[R]ecent amendments to the Communications Act, 47 U.S.C. § 705, provide that unless the sender has established a marketing system an individual using a satellite antenna at his dwelling may freely receive unscrambled satellite cable programming without incurring any liability for unauthorized interception. . . . In enacting this legislation, Congress wished to ensure that Americans who did not have access to cable programming would be able to obtain such programming.").

[70/] *1986 Satellite Preemption Order* at ¶ 26 (1986). *See also Preemption of State and Local Laws Concerning Amateur Operator Use of Transceivers Capable of Reception Beyond Amateur Service Frequency Allocations*, 8 FCC Rcd 6413, 6416 (1993) (finding that certain state and local scanner laws "prevent amateur operators from using their mobile stations to the full extent permitted under the Commission's Rules and thus are in clear conflict with federal objectives of facilitating and promoting the Amateur Radio Service.").

D. EXECUTIVE ORDER 13,132 IS IRRELEVANT TO THIS PROCEEDING.

CCO argues that the proposed amendment to Section 1.4000 is foreclosed by Executive Order 13,132, which imposes various preemption requirements on any agency other than an "independent regulatory agency" as defined in 44 U.S.C. § 3502(5).[71/] Under that statutory provision, the term "independent regulatory agency" includes the Federal Communications Commission. Accordingly, since the Commission is an independent regulatory agency exempt from Executive Order 13.132, CCO's argument fails.

III. CONCLUSION.

The filings submitted by WCA and other supporting parties in this docket demonstrate in considerable detail why the Commission can and should amend Section 1.4000 to protect *all* fixed wireless subscribers, not just those explicitly addressed in Section 207. By contrast, CCO offers scattershot legal arguments and inflammatory rhetoric in lieu of substance, in the hope that the Commission will be strongarmed into abandoning its statutory mandate to eliminate unreasonable local barriers to rapid deployment of fixed wireless technology. The Commission has not succumbed to such tactics before, and it should not do so here. WCA thus urges the Commission

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[71/] CCO Reply Comments at 44.

to remain true to Congress's pro-consumer and pro-competitive agenda and amend Section 1.4000 of its rules as proposed by WCA in this proceeding.

Respectfully submitted,

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October 22, 1999

APPENDIX A

Section 1.4000 of Title 47 of the Code of Federal Regulations is amended to read as follows:

(a) Any restriction, including but not limited to any state or local law or regulation, including zoning, land-use, or building regulation, or any private covenant, homeowners's association rule or similar restriction on property within the exclusive use or control of the antenna user where the user has a direct or indirect ownership interest in the property, that impairs the installation, maintenance, or use of:

(1) an antenna that is designed to receive direct broadcast satellite service, including direct-to-home satellite services, that is one meter or less in diameter or is located in Alaska;

(2) a subscriber premises reception or transmission antenna that is designed to provide ~~receive video programming~~ any wireless service ~~via multipoint distribution services, including multichannel multipoint distribution services, instructional television fixed services, and local multipoint distribution services~~, and that is one meter or less in diameter or diagonal measurement;

(3) an antenna that is designed to receive television broadcast signals; or

(4) a mast supporting an antenna described in subparagraphs (1), (2) and (3) above

is prohibited, to the extent it so impairs, subject to paragraph (b). For purposes of this rule, a law, regulation or restriction impairs installation, maintenance or use of an antenna if it: (1) unreasonably delays or prevents installation, maintenance or use; (2) unreasonably increases the cost of installation, maintenance or use; or (3) precludes reception of an acceptable quality signal. Any fee or cost imposed on a viewer by a rule, law, regulation or restriction must be reasonable in light of the cost of the equipment or services and the rule, law, regulation or restriction's treatment of comparable devices. No civil, criminal, administrative, or other legal action of any kind shall be taken to enforce any restriction or regulation prohibited by this rule except pursuant to paragraph (c) or (d). In addition, except with respect to restrictions pertaining to safety and historic preservation as described in paragraph (b) below, if a proceeding is initiated pursuant to paragraph (c) or (d) below, the entity seeking to enforce the antenna restrictions in question must suspend all enforcement efforts pending completion of review. No attorney's fees shall be collected or assessed and no fine or other penalties shall accrue against an antenna user while a proceeding is pending to determine the validity of any restriction. If a ruling is issued adverse to a viewer, the viewer shall be granted at lest a 21 day grace period in which to comply with the adverse ruling; and neither a fine nor a penalty may be collected from the viewer if the viewer complies with the adverse ruling during this grace period, unless the proponent of the restriction demonstrates, in the same proceeding which resulted in the adverse ruling, that the viewer's claim in the proceeding was frivolous.

(b) Any restriction otherwise prohibited by paragraph (a) is permitted if:

(1) it is necessary to accomplish a clearly defined, legitimate safety objective that is either stated in the text, preamble or legislative history of the restriction or described as applying to that restriction in a document that is readily available to antenna users, and would be applied to the extent practicable in a non-discriminatory manner to other appurtenances, devices or fixtures that are comparable in size and weight and pose a similar or greater safety risk as these antennas to which local regulation would normally apply; or

(2) it is necessary to preserve a prehistoric or historic district, site, building, structure or object included in, or eligible for inclusion on, the National Register of Historic Places, as set forth in the National Historic Preservation Act of 1966, as amended, 16 U.S.C. § 470, and imposes no greater restrictions on antennas covered by this rule than are imposed on the installation, maintenance or use of other modern appurtenances, devices or fixtures that are comparable in size, weight, and appearance to these antennas; and

(3) it is more burdensome to affected antenna users than is necessary to achieve the objectives described above.

(c) Local governments or associations may apply to the Commission for a waiver of this rule under Section 1.3 of the Commission's rules, 47 C.F.R. § 1.3. Waiver requests must comply with the procedures in subsections (e) and (g) of this rule and will be put on public notice. The Commission may grant a waiver upon a showing by the applicant of local concerns of a highly specialized or unusual nature. No petition for waiver shall be considered unless it specifies the restriction at issue. Waivers granted in accordance with this section shall not apply to restrictions amended or enacted after the waiver is granted. Any responsive pleadings must be served on all parties and filed within 30 days after release of a public notice that such petition has been filed. Any replies must be filed within 15 days thereafter.

(d) Parties may petition the Commission for a declaratory ruling under Section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, or a court of competent jurisdiction, to determine whether a particular restriction is permissible or prohibited under this rule. Petitions to the Commission must comply with the procedures in subsections (e) and (g) of this rule and will be put on public notice. Any responsive pleadings in a Commission proceeding must be served on all parties and filed within 30 days after release of a public notice that such petition has been filed. Any replies in a Commission proceeding must be served on all parties and filed within 15 days thereafter.

(e) Copies of petitions for declaratory rulings and waivers must be served on interested parties, including parties against whom the petitioner seeks to enforce the restriction or parties whose restrictions the petitioner seeks to prohibit. A certificate of service stating on whom the petition was served must be filed with the petition. In addition, in a Commission proceeding brought by an association or a local government, constructive notice of the proceeding must be given to members

of the association or to the citizens under the local government's jurisdiction. In a court proceeding brought by an association, an association must give constructive notice of the proceeding to its members. Where constructive notice is required, the petitioner or plaintiff must file with the Commission or the court overseeing the proceeding a copy of the constructive notice with a statement explaining where the notice was placed and why such placement was reasonable.

(f) In any proceeding regarding the scope or interpretation of any provision of this section, the burden of demonstrating that a particular governmental or nongovernmental restriction complies with this section and does not impair the installation, maintenance or use of devices of any antenna covered by this rule ~~designed for over-the-air reception of video programming services~~ shall be on the party that seeks to impose or maintain the restriction.

(g) All allegations of fact contained in petitions and related pleadings before the Commission must be supported by affidavit of a person or persons with actual knowledge thereof. An original and two copies of all petitions and pleadings should be addressed to the Secretary, Federal Communications Commission, 445 12th Street, N.W., Washington, DC 20554, Attention: Cable Service Bureau. Copies of the petitions and related pleadings will be available for public inspection in the Cable Reference Room in Washington, D.C. Copies will be available for purchase from the Commission's contract copy center, and Commission decisions will be available on the Internet.

(h) So long as the property owner consents, a person residing on the property owner's property with the property owner's permission shall be treated as an antenna user covered by this rule and shall have the same rights as the property owner with regard to third parties, including but not limited to local governments and associations, other than the property owner

CERTIFICATE OF SERVICE

I, Andrew Kreig, hereby certify that on this 22nd day of October, 1999, I caused copies of the foregoing Further Reply Comments to be served, by first class postage prepaid U.S. Mail, on the following:

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